Supreme Court, U. S.
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in the

Supreme Court

of the

United States

No. 79-756

JOSE ABUJASEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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COMES NOW the Petitioner, JOSE ABUJASEN, by and through his undersigned attorney, and pursuant to Supreme Court Rule 19 petitions this Honorable Court for Writ of Certiorari in this cause in support of which he states the following:

1. That Petitioner seeks review of *United States -v- Sorzano,* _____ F.2d. _____ (5th Cir., decided September 19, 1979).

2. That the date of the judgment sought to be reviewed is September 19, 1979.

3. That the Petition for Rehearing of the decision filed on September 19, 1979, was denied on October 22, 1979.

4. That this Honorable Court possesses jurisdiction in this cause to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. Section 1254 (1).

5. That the questions presented for review are the following:

> (A) Whether a trial court errs in denying a Defendant's Motion for Mistrial and deprives him of his constitutional rights to a fair trial where the Assistant United States Attorney, in closing argument, comments to the jury numerous times concerning the evidence being "uncontradicted" and asking a "how come" series of questions where such series were manifestly intended and were of such a character that a jury would naturally necessarily having taken them as comments on the failure of a defendant to testify.
>
> (B) Whether a trial court errs in allowing into evidence hearsay statements under the co-conspirator hearsay exception where two separate conspiracies clearly exist and it is not shown by evidence aliunde of such statements that such statements were made in furtherance of a conspiracy in which the defendant participated?

6. That the Fifth Amendment to the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

7. That the Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

8. That Title 21, Section 841(a) of the United States Code states as follows:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly and intentionally — (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, any controlled substance; or, (2) to create, distribute, or dispense or possess with intent to distribute or dispense, a counterfeit substance.

9. That Title 21, Section 846 of the United States Code states as follows:

Anyone who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

10. Title 18, Section 2 of the United States Code states as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

11. That the facts material to the consideration of the questions presented are as follows:

On July 3rd and 5th, 1978, Richard Fiano, a special agent with the Drug Enforcement Administration, had a conversation with Anthony John Billow concerning the purchase of cocaine. On July 6, 1978, Fiano arranged with Billow to meet at Lums Restaurant at 107th Avenue and S.W. 8th Street, Miami, Florida.

Fiano met Billows at Lums on July 6th, where he had a short conversation concerning the purchase of four ounces of cocaine. Approximately ten minutes later, Petitioner and Sorzano arrived and sat down at a booth. Billow introduced them as Jose and Emilio.

Sorzano told Fiano the cocaine he would be purchasing was of excellent quality, that it cost $1,600 per ounce, and that there would be no problem getting a kilo. Sorzano said a kilo would be eighty-seven per cent pure and the price would be $45,000 to $56,000 for it.

Petitioner then said they were going to Johnny's house and would meet Fiano and Billow at a 7-11 Store. Petitioner and Sorzano eventually arrived at the 7-11 Store and Fiano was advised they could not get in touch with their man and it would be an hour or so before they could. Fiano then told them he would be back in approximately one hour.

Fiano returned at 5:00 p.m. at which time Billow told him Petitioner and Sorzano were on their way to Johnny's house to pick up the cocaine and would meet them at the Pizza Hut Restaurant on S.W. 8th Street and 107 Avenue. They proceeded to the Pizza Hut whereupon Fiano observed Petitioner drive up with Sorzano. Fiano was told they were going to do a kilo deal then and he would not be able to get his cocaine until

6:30 p.m. Fiano told Billow he would not wait around till then and Billow should get in touch with him.

At 7:10 p.m. Fiano received a call from Billow who told him the package was there and he was ready. Fiano then met with Agent Marin and they proceeded back to the Pizza Hut Restaurant.

Upon arriving at the restaurant, Fiano met with Billow and Marin met with and talked with Petitioner in Spanish. Fiano asked Petitioner if everything was ready, whereupon Billow answered affirmatively that they could either go into the men's room or into the parking lot. Fiano indicated that they should go to the parking lot.

Subsequently, Fiano and Billow proceeded to the parking lot whereupon Billow went to his right sock and pulled out a clear plastic bag with a white powdery substance which was field tested positive for cocaine. Upon going back into the restaurant, Fiano told Marin everything was alright and to pay Petitioner. He also told him the price was sixty-four. At such time Marin and Petitioner left the Pizza Hut and came back speaking Spanish. Petitioner then left and was not arrested until September.

Fiano admitted his direct transaction for the cocaine was with Billow and Petitioner was not involved in the negotiations on July 3rd, 4th or 5th. Furthermore, Petitioner's name was never mentioned in the conversation with Billow on July 6th which was taped and played for the jury.

Fiano never saw Petitioner in possession of the package and in fact the package was received at a place

where the Petitioner was not present. Petitioner never indicated he knew what was in the package and never said it was his package. Petitioner was never given any money and never gave Fiano any controlled substance.

Agent Marin testified he was on surveillance on July 6th when he observed Fiano meet with Petitioner and Sorzano at Lums on 107th Avenue and S.W. 8th Street. Billow was also observed at that time.

Later, at approximately 7:30 or 8:00 p.m., Marin had met in an undercover capacity with Petitioner, Fiano and Billow at the Pizza Hut at 107th Avenue and S.W. 8th Street. Marin testified as to negotiations in Spanish for the sale and purchase of approximately five kilograms of cocaine.

Fiano and Billow had occasion to leave the restaurant whereupon Marin conversed with Petitioner concerning the purchase of five kilograms. Fiano then returned and told Marin to give Petitioner the money, which Petitioner wanted done outside.

Marin entered Petitioner's vehicle and gave him $6,400. He then left the vehicle whereupon on the way back Sorzano nodded at Petitioner.

Marin admitted he never received anything for the $6,400 he gave to someone. He never saw Petitioner in possession of a controlled substance and could only testify Petitioner had nodded to Billow.

During his closing argument, the Assistant United States Attorney made the following comments to the jury:

You have heard of the dates the 3rd the 5th and the 6th. Remember when I read the indictment? The first count charges a first overt act on July 3rd, 1978. They discussed a cocaine transaction. This is the first overt act. Mr. Fiano testified to that. *There was no contradiction.*

The second overt act was on July the 5th 1978. Co-conspirator Arthur Billow discussed the cocaine transaction with Special Agent Richard Fiano. He testified to that date and *it is uncontradicted* on cross-examination.

And lastly, you heard the forensic chemist, Mr. Kiser, testify as to the percentage. He was qualified as an expert by the judge. And he testified that this substance is cocaine. *It is uncontradicted. He did not even get cross-examined.*

Don't be confused, because we have a series of events that led up to this. This is the subject of this conversation, the beginning of the conspiracy on July the 3rd and on July 4th and it terminated on July 6th. And Mr. Engel would have you believe that there is no conspiracy on July 6th. Well I ask you people *how come* they were there at Lums and *how come* they were there at the 7-11 and *how come* they were there at the Pizza Hut; and *how come* through all of these times and these meetings the $6,400 figure was mentioned . . .

12. That this Honorable Court should take jurisdiction of this cause and issue a Writ of Certiorari for the following reasons:

(1) That the Fifth Circuit Court of Appeals in ruling on the issue raised concerning the prosecution's comment regarding the failure of Petitioner to have testified, decided an important question of federal Constitutional law in a manner inconsistent with decisions of other federal circuits and such questions should be settled by this Honorable Court.

(2) That this Honorable Court has never been confronted with the issue raised by the "how come" argument of the Assistant United States Attorney in his closing argument.

(3) That in ruling as it did, as to the question of the prosecution's comment on the failure of Petitioner to testify, the 5th Circuit has decided an important federal question in a way in conflict with applicable decisions of this Honorable Court.

(4) That this Honorable Court has never ruled on the issue of the test which shall be applied in determining whether or not a comment by an Assistant United States Attorney constitutes a comment on the failure of an accused to testify.

(5) That this Honorable Court has never decided, but should decide, the important question of federal law raised by the comments of the Assistant United States Attorney that the evidence presented by the Government was uncontradicted.

(6) That in affirming Petitioner's conviction below notwithstanding the co-conspirator hearsay exception issue raised, the 5th Circuit Court of Appeals has clearly decided a federal question in a way in conflict with applicable decisions of this Honorable Court.

13. That the importance of the questions raised lies in their foundation in the basic tenants of the 5th and 6th Amendments to the United States Constitution.

WHEREFORE, Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to the 5th Circuit Court of Appeals and order Petitioner's conviction be reversed.

I HEREBY CERTIFY that a true and correct copy of above and foregoing was mailed to the Solicitor General's Office, Washington, D.C., United States Attorney's Office, 300 Ainsley Building, Miami, Florida, this 12 day of Nov, 1979.

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BY_____
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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Emilio SORZANO and Jose Abujasen,
Defendants-Appellants.

No. 79-5090
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 19, 1979.

Defendants were convicted in the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, Chief Judge, of conspiracy to distribute cocaine and distributing cocaine and possessing cocaine with intent to distribute, and they appealed. The Court of Appeals held that prosecutor in closing argument did not comment on defendants' failure to testify, where two of the challenged comments referred specifically to lack of contradiction in the testimony of the Government's witnesses on cross-examination, and third challenged comment referred to a conversation between the government witness and a coconspirator who was not being tried in the same action, and all the evidence showed that defendants were not present and thus could not have directly contradicted the Government's evidence even if they had testified.

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Affirmed.

1. Criminal Law — 721(1, 5)

Direct comment by the prosecution regarding failure of accused to testify is forbidden, but one may point out that the testimony of witnesses is uncontradicted, particularly where someone other than defendant could have offered contrary evidence; the test is whether the statement in context was manifestly intended or was of such character that jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. U.S.C.A.Const. Amend. 5.

2. Criminal Law — 721(3, 5)

Prosecutor in closing argument did not comment on defendants' failure to testify, where two of the challenged comments referred specifically to lack of contradiction in the testimony of the Government's witnesses on cross-examination, and third challenged comment referred to a conversation between the government witness and a coconspirator who was not being tried in the same action, and all the evidence showed that defendants were not present and thus could not have directly contradicted the Government's evidence even if they had testified. U.S.C.A.Const. Amend. 5.

3. Criminal Law — 720(6)

Series of rhetorical questions by the prosecution asking "how come" defendants were present at certain times and places where cocaine deals were being carried

on if they were not part of the conspiracy was within the bounds of the right of the prosecution to urge the conclusions it thinks the jury should draw from the evidence.

Appeals from the United States District Court for the Southern District of Florida.

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM.

Jose Abujasen and Emilio Sorzano were tried and convicted by a jury on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. §846, and two counts of distributing cocaine and possessing cocaine with intent to distribute, violations of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Each was sentenced to concurrent terms of imprisonment of three years on each of the three counts. On this appeal, both appellants object to certain statements made by the prosecution in closing argument which they contend commented on their failure to testify at trial. Appellant Abujasen also objects to the admission into evidence of certain hearsay statements allegedly made by a coconspirator, and appellant Sorzano argues that the evidence was insufficient to prove his involvement in the conspiracy alleged by the government.

[1] It is well settled that direct comment by the prosecution regarding the failure of an accused to testify is forbidden under the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Appellants here object to statements made by the prosecutor in closing argument that certain

testimony offered by its witnesses was uncontradicted. As we said in *Jennings v. United States,* 527 F.2d 862, 871 (5th Cir. 1976), "[I]t is well established that one may point out that the testimony of witnesses is uncontradicted [citations omitted], particularly where someone other than the defendant could have offered contrary evidence. [citations omitted] The test we must apply is 'whether or not the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' *United States v. Wilson,* 500 F.2d 715, 721 (5th Cir. 1974), *cert. denied,* 420 U.S. 977, 43 L.Ed.2d 658, 98 S.Ct. 1403 (1975)." Of course to determine the manifest intent and the natural and necessary effect of such statements, we must examine them in context. *United States v. Austin,* 585 F.2d 1271, 1279 (5th Cir. 1978).

[2] Applying these standards to the present appeal, we hold that the prosecution's comments were not improper. Two of the prosecutor's three challenged comments referred specifically to lack of contradiction in the testimony of the government's witnesses on cross examination. They thus lack both the requisite intent and effect. *See United States v. Jennings,* 527 F.2d at 871. The third challenged comment referred to a conversation between one of the government's witnesses and one of defendant's co-conspirators who was not being tried in the same action. Since all the evidence showed, and the parties agreed, that defendants were not present at that conversation, defendants could not have directly contradicted the government's evidence even if they had testified. The prosecutor's statement cannot logically, therefore, be taken as a comment on defendants' failure to testify. Taken as a whole, the prosecutor's statements

more naturally appear to be comments on the general strength of the case presented by the government and the failure of the defense to score bull's eye, or perhaps even hit the white, on the firing range of cross examination, rather than references to defendants' silence. As such, they were not improper under the test stated in *Jennings.* Furthermore, the trial court promptly and commendably offered curative instructions when defense counsel objected after the third comment. *See United States v. Rodarte,* 596 F.2d 141, No. 78-5628 (5th Cir. June 4, 1979), at 5270.

[3] Appellants raise similar objections to a series of rhetorical questions by the prosecution asking "how come" appellants were present at certain times and places where negotiations concerning the cocaine deal were being carried on if they were not part of the conspiracy. These questions, rhetorical in form, were inferential in substance and fall within the bounds of the right of the prosecution to urge the conclusions it thinks the jury should draw from the evidence. *United States v. Allen,* 588 F.2d 1100, 1108 (5th Cir. 1979).

We have also examined the other contentions of appellants and find them to be without merit.

The judgment of the district court is affirmed.

AFFIRMED.